

1-1 By: Madden (Senate Sponsor - Whitmire) H.B. No. 3228  
1-2 (In the Senate - Received from the House May 5, 2009;  
1-3 May 6, 2009, read first time and referred to Committee on Criminal  
1-4 Justice; May 23, 2009, reported adversely, with favorable  
1-5 Committee Substitute by the following vote: Yeas 6, Nays 0;  
1-6 May 23, 2009, sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR H.B. No. 3228 By: Whitmire

1-8 A BILL TO BE ENTITLED  
1-9 AN ACT

1-10 relating to the offense of prohibited substances and items in  
1-11 correctional facilities.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Section 38.11, Penal Code, as amended by  
1-14 Chapters 949 (H.B. 1575) and 1092 (H.B. 2077), Acts of the 79th  
1-15 Legislature, Regular Session, 2005, is reenacted and amended to  
1-16 read as follows:

1-17 Sec. 38.11. PROHIBITED SUBSTANCES AND ITEMS IN ~~[ADULT OR~~  
1-18 ~~JUVENILE]~~ CORRECTIONAL ~~[OR DETENTION]~~ FACILITY ~~[OR ON PROPERTY OF~~  
1-19 ~~TEXAS DEPARTMENT OF CRIMINAL JUSTICE OR TEXAS YOUTH COMMISSION]~~.

1-20 (a) A person commits an offense if the person provides, or  
1-21 possesses with the intent to provide:

1-22 (1) an alcoholic beverage, controlled substance, or  
1-23 dangerous drug to ~~[an inmate of a correctional facility or to]~~ a  
1-24 person in the custody of a ~~[secure]~~ correctional facility ~~[or~~  
1-25 ~~secure detention facility for juveniles]~~, except on the  
1-26 prescription of a ~~[physician or]~~ practitioner~~[, as defined in~~  
1-27 ~~Section 551.003, Occupations Code]~~;

1-28 (2) a deadly weapon to ~~[an inmate of a correctional~~  
1-29 ~~facility or to]~~ a person in the custody of a ~~[secure]~~ correctional  
1-30 facility ~~[or secure detention facility for juveniles]~~;

1-31 (3) a cellular telephone or other wireless  
1-32 communications device or a component of one of those devices~~[,~~  
1-33 ~~cigarette, tobacco product, or money]~~ to a person in the custody ~~[an~~  
1-34 ~~inmate]~~ of a correctional facility ~~[operated by or under contract~~  
1-35 ~~with the Texas Department of Criminal Justice or to a person in the~~  
1-36 ~~custody of a secure correctional facility or secure detention~~  
1-37 ~~facility for juveniles, except for money that is provided for the~~  
1-38 ~~benefit of the juvenile in accordance with facility rules]~~;

1-39 (4) ~~[a cellular telephone or]~~ money to a person  
1-40 confined in a correctional facility ~~[local jail regulated by the~~  
1-41 ~~Commission on Jail Standards]~~; or

1-42 (5) a cigarette or tobacco product to a person  
1-43 confined in a correctional facility, except that if the facility is  
1-44 a local jail regulated by the Commission on Jail Standards, the  
1-45 person commits an offense only if [and in] providing the cigarette  
1-46 or tobacco product ~~[the person]~~ violates a rule or regulation  
1-47 adopted by the sheriff or jail administrator that:

1-48 (A) prohibits the possession of a cigarette or  
1-49 tobacco product by a person ~~[an inmate]~~ confined in the jail; or

1-50 (B) places restrictions on:

1-51 (i) the possession of a cigarette or  
1-52 tobacco product by a person ~~[an inmate]~~ confined in the jail; or

1-53 (ii) the manner in which a cigarette or  
1-54 tobacco product may be provided to a person ~~[an inmate]~~ confined in  
1-55 the jail.

1-56 (b) A person commits an offense if the person takes an  
1-57 alcoholic beverage, controlled substance, or dangerous drug into a  
1-58 correctional facility ~~[or a secure correctional facility or secure~~  
1-59 ~~detention facility for juveniles, except for delivery to a facility~~  
1-60 ~~warehouse, pharmacy, or physician]~~.

1-61 (c) A person commits an offense if the person takes a  
1-62 controlled substance or dangerous drug on property owned, used, or  
1-63 controlled by a correctional facility ~~[the Texas Department of~~

~~Criminal Justice, the Texas Youth Commission, or a secure correctional facility or secure detention facility for juveniles, except for delivery to a warehouse, pharmacy, or physician on property owned, used, or controlled by the department, the commission, or the facility].~~

(d) A person commits an offense if the person:

(1) possesses a controlled substance or dangerous drug while in a correctional facility or ~~+~~

~~[(A)] on property owned, used, or controlled by [the Texas Department of Criminal Justice, the Texas Youth Commission, or] a [secure] correctional facility [or secure detention facility for juveniles, or~~

~~[(B) in a correctional facility or a secure correctional facility or secure detention facility for juveniles]; or~~

(2) possesses a deadly weapon while in a correctional facility ~~[or in a secure correctional facility or secure detention facility for juveniles].~~

(e) It is an affirmative defense to prosecution under Subsection (b), (c), or (d)(1) ~~[of this section]~~ that the person possessed the alcoholic beverage, controlled substance, or dangerous drug pursuant to a prescription issued by a practitioner or while delivering the beverage, substance, or drug to a warehouse, pharmacy, or practitioner ~~[physician]~~ on property owned, used, or controlled by the ~~[department, the Texas Youth Commission, or by the operator of a secure]~~ correctional facility ~~[or secure detention facility for juveniles]~~. It is an affirmative defense to prosecution under Subsection (d)(2) ~~[of this section]~~ that the person possessing the deadly weapon is a peace officer or is an officer or employee of the correctional facility who is authorized to possess the deadly weapon while on duty or traveling to or from the person's place of assignment.

(f) In this section:

(1) "Practitioner" has the meaning assigned by Section 481.002, Health and Safety Code.

(2) "Prescription" has the meaning assigned by Section 481.002, Health and Safety Code.

(3) "Cigarette" has the meaning assigned by Section 154.001, Tax Code.

(4) "Tobacco product" has the meaning assigned by Section 155.001, Tax Code.

(5) "Component" means any item necessary for the current, ongoing, or future operation of a cellular telephone or other wireless communications device, including a subscriber identity module card or functionally equivalent portable memory chip, a battery or battery charger, and any number of minutes that have been purchased or for which a contract has been entered into and during which a cellular telephone or other wireless communications device is capable of transmitting or receiving communications.

(6) "Correctional facility" means:

(A) any place described by Section 1.07(a)(14)(A), (B), or (C); or

(B) a secure correctional facility or secure detention facility, as defined ["Secure correctional facility" and "secure detention facility" have the meanings assigned] by Section 51.02, Family Code.

(g) An offense under this section is a felony of the third degree.

(h) Notwithstanding Section 15.01(d), if a person commits the offense of criminal attempt to commit an offense under Subsection (a), ~~[or]~~ (b), or (c), the offense committed under Section 15.01 is a felony of the third degree.

(i) It is an affirmative defense to prosecution under Subsection (b) that the actor:

(1) is a duly authorized member of the clergy with rights and privileges granted by an ordaining authority that includes administration of a religious ritual or ceremony requiring the presence or consumption of an alcoholic beverage; and

(2) takes four ounces or less of an alcoholic beverage into the correctional facility ~~[or the secure correctional facility or secure detention facility for juveniles]~~ and personally consumes all of the alcoholic beverage or departs from the facility with any portion of the beverage not consumed.

(j) A person commits an offense if the person, while confined in ~~[an inmate of]~~ a correctional facility, ~~[operated by or under contract with the Texas Department of Criminal Justice or while in the custody of a secure correctional facility or secure detention facility for juveniles]~~ possesses a cellular telephone or other wireless communications device or a component of one of those devices.

(k) A person commits an offense if, with the intent to provide to or make a cellular telephone or other wireless communications device or a component of one of those devices available for use by a person in the custody of a correctional facility, the person:

(1) acquires a cellular telephone or other wireless communications device or a component of one of those devices to be delivered to the person in custody;

(2) provides a cellular telephone or other wireless communications device or a component of one of those devices to another person for delivery to the person in custody; or

(3) makes a payment to a communication common carrier, as defined by Article 18.20, Code of Criminal Procedure, or to any communication service that provides to its users the ability to send or receive wire or electronic communications.

SECTION 2. The heading to Article 18.20, Code of Criminal Procedure, is amended to read as follows:

Art. 18.20. DETECTION, INTERCEPTION, AND USE OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS.

SECTION 3. Section 4, Article 18.20, Code of Criminal Procedure, is amended to read as follows:

Sec. 4. OFFENSES FOR WHICH INTERCEPTIONS MAY BE AUTHORIZED. A judge of competent jurisdiction may issue an order authorizing interception of wire, oral, or electronic communications only if the prosecutor applying for the order shows probable cause to believe that the interception will provide evidence of the commission of:

(1) a felony under Section 19.02, 19.03, or 43.26, Penal Code;

(2) a felony under:  
(A) Chapter 481, Health and Safety Code, other than felony possession of marihuana;

(B) Section 485.032 ~~[485.033]~~, Health and Safety Code; or

(C) Chapter 483, Health and Safety Code;

(3) an offense under Section 20.03 or 20.04, Penal Code;

(4) an offense under Chapter 20A, Penal Code;

(5) an offense under Chapter 34, Penal Code, if the criminal activity giving rise to the proceeds involves the commission of an offense under Title 5, Penal Code, or an offense under federal law or the laws of another state containing elements that are substantially similar to the elements of an offense under Title 5; ~~[or]~~

(6) an offense under Section 38.11, Penal Code; or

(7) an attempt, conspiracy, or solicitation to commit an offense listed in this section.

SECTION 4. Section 5, Article 18.20, Code of Criminal Procedure, is amended by amending Subsection (a) and adding Subsections (c) and (d) to read as follows:

(a) Except as otherwise provided by this section and Sections [Section] 8A and 8B, only the Department of Public Safety is authorized by this article to own, possess, install, operate, or monitor an electronic, mechanical, or other device. The Department of Public Safety may be assisted by an investigative or law enforcement officer or other person in the operation and monitoring of an interception of wire, oral, or electronic communications,

provided that the officer or other person:

(1) is designated by the director for that purpose; and

(2) acts in the presence and under the direction of a commissioned officer of the Department of Public Safety.

(c) The Texas Department of Criminal Justice may own electronic, mechanical, or other devices for a use or purpose authorized by Section 500.008, Government Code, and the inspector general of the Texas Department of Criminal Justice, a commissioned officer of that office, or another person acting in the presence and under the direction of a commissioned officer of that office may possess, install, operate, or monitor those devices as provided by Section 500.008.

(d) The Texas Youth Commission may own electronic, mechanical, or other devices for a use or purpose authorized by Section 61.0455, Human Resources Code, and the inspector general of the Texas Youth Commission, a commissioned officer of that office, or another person acting in the presence and under the direction of a commissioned officer of that office may possess, install, operate, or monitor those devices as provided by Section 61.0455.

SECTION 5. Article 18.20, Code of Criminal Procedure, is amended by adding Section 8B to read as follows:

Sec. 8B. DETECTION OF CELLULAR TELEPHONE OR OTHER WIRELESS COMMUNICATIONS DEVICE IN CORRECTIONAL OR DETENTION FACILITY. (a) In this section, "correctional facility" has the meaning assigned by Section 39.04(e), Penal Code.

(b) Notwithstanding any other provision of this article or Article 18.21, the office of the inspector general of the Texas Department of Criminal Justice may:

(1) without a warrant, use electronic, mechanical, or other devices to detect the presence or use of a cellular telephone or other wireless communications device in a correctional facility;

(2) without a warrant, intercept, monitor, detect, or, as authorized by applicable federal laws and regulations, prevent the transmission of any communication transmitted through the use of a cellular telephone or other wireless communications device in a correctional facility; and

(3) use, to the extent authorized by law, any information obtained under Subdivision (2), including the contents of an intercepted communication, in any criminal or civil proceeding before a court or other governmental agency or entity.

(c) Not later than the 30th day after the date on which the office of the inspector general uses an electronic, mechanical, or other device under Subsection (b), the inspector general shall report the use of the device to:

(1) a prosecutor with jurisdiction in the county in which the device was used; or

(2) the special prosecution unit established under Subchapter E, Chapter 41, Government Code, if that unit has jurisdiction in the county in which the device was used.

(d) When using an electronic, mechanical, or other device under Subsection (b), the office of the inspector general shall minimize the impact of the device on any communication that is not reasonably related to the detection of the presence or use of a cellular telephone or other wireless communications device in a correctional facility.

(e) A person confined in a correctional facility does not have an expectation of privacy with respect to the possession or use of a cellular telephone or other wireless communications device located on the premises of the facility. The person who is confined, and any person with whom that person communicates through the use of a cellular telephone or other wireless communications device, does not have an expectation of privacy with respect to the contents of any communication transmitted by the cellular telephone or wireless communications device.

SECTION 6. Section 17, Article 18.20, Code of Criminal Procedure, is amended to read as follows:

Sec. 17. NONAPPLICABILITY. This article does not apply to conduct described as an affirmative defense under Section 16.02(c),

Penal Code, except as otherwise specifically provided by that section.

SECTION 7. Chapter 500, Government Code, is amended by adding Section 500.008 to read as follows:

Sec. 500.008. DETECTION AND MONITORING OF CELLULAR TELEPHONES. (a) The department may own and the office of inspector general may possess, install, operate, or monitor an electronic, mechanical, or other device, as defined by Article 18.20, Code of Criminal Procedure.

(b) The inspector general shall designate in writing the commissioned officers of the office of inspector general who are authorized to possess, install, operate, and monitor electronic, mechanical, or other devices for the department.

(c) An investigative or law enforcement officer or other person, on request of the office of inspector general, may assist the office in the operation and monitoring of an interception of wire, oral, or electronic communications if the investigative or law enforcement officer or other person:

(1) is designated by the executive director for that purpose; and

(2) acts in the presence and under the direction of a commissioned officer of the inspector general.

SECTION 8. Subchapter C, Chapter 61, Human Resources Code, is amended by adding Section 61.0455 to read as follows:

Sec. 61.0455. DETECTION AND MONITORING OF CELLULAR TELEPHONES. (a) The commission may own and the office of the inspector general may possess, install, operate, or monitor an electronic, mechanical, or other device, as defined by Article 18.20, Code of Criminal Procedure.

(b) The inspector general shall designate in writing the commissioned officers of the office of inspector general who are authorized to possess, install, operate, and monitor electronic, mechanical, or other devices for the commission.

(c) An investigative or law enforcement officer or other person, on request of the office of inspector general, may assist the office in the operation and monitoring of an interception of wire, oral, or electronic communications if the investigative or law enforcement officer or other person:

(1) is designated by the executive commissioner for that purpose; and

(2) acts in the presence and under the direction of a commissioned officer of the inspector general.

SECTION 9. Section 16.02, Penal Code, is amended by adding Subsection (e-1) to read as follows:

(e-1) It is a defense to prosecution under Subsection (d)(1) that the electronic, mechanical, or other device is possessed by a person authorized to possess the device under Section 500.008, Government Code, or Section 61.0455, Human Resources Code.

SECTION 10. The changes in law made by this Act with respect to Sections 16.02 and 38.11, Penal Code, apply only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

SECTION 11. This Act takes effect September 1, 2009.

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